

UNITED STATES OF AMERICA

V.

DAVID M. HICKS

**PROSECUTION RESPONSE TO
DEFENSE MOTION
TO DISMISS CHARGE 2**

18 October 2004

1. **Timeliness.** This response is being filed within the timeline established by the Presiding Officer.
2. **Position on Motion.** The Defense Motion to dismiss Charge 2 (Attempted Murder by an Unprivileged Belligerent) should be denied.

3. Facts

- a. As the United States Supreme Court succinctly stated in *Hamdi v. Rumsfeld*:

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these ‘acts of treacherous violence,’ Congress passed a resolution authorizing the President to ‘use all necessary and appropriate force against those nations, organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.’ Authorization for Use of Military Force (‘the AUMF’), 115 Stat 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2635 (2004).

- b. Subsequent to the AUMF, the President issued his Military Order of November 13, 2001 (“Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”). 66 Fed. Reg. 222 (November 16, 2001). In doing so, the President expressly relied on “the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and section 821 and 836 of title 10, United States Code.” *Id.*¹

¹ Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice (“UCMJ”). These sections provide, in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

c. In his Order, the President found, *inter alia*, “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”² The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed” *Id.*, Section 2(a). He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order. *Id.*, Section 2(b)

d. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority), MCO No. 1, para. 3(A), and over offenses (violations of the laws of war and all other offenses triable by military commission). *Id.*, paragraph 3(B). The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions” *Id.*, paragraph 8(A)

e. The General Counsel did so, issuing a series of Military Commission Instructions (MCIs), including MCI No. 2: Crimes and Elements for Trial by Military Commission.

f. On June 9, 2004, the Appointing Authority approved charges against the Accused, including, *inter alia*, Attempted Murder by an Unprivileged Belligerent. Murder by an Unprivileged Belligerent is an enumerated charge in MCI No. 2,³ and Attempt is an enumerated form of liability/related offenses.⁴ On June 25, 2004, the Appointing Authority referred these charges to this Military Commission for trial.

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

² *Id.*, Section 1(e)

³ MCI No. 2, para. 6(B)(3) and (4)

⁴ *Id.*, para. 6(C)(6) and (7)

4. Legal Authority Cited

- a. President's Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").
- b. Military Commission Order No. 1.
- c. Military Commission Instruction No. 2.
- d. Department of the Army Field Manual 27-10, July 1956.
- e. 10 U.S. Code §§ 821, 836 (Articles 21, 36, Uniform Code of Military Justice).
- f. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004).
- g. *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).
- h. *Ex Parte Quirin et al*, 317 U.S. 1 (1942).
- i. *Talbot v. Janson*, 3 U.S. 133 (1795).
- j. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957).
- k. *Padilla v. Bush*, 233 F.Supp.2d 564, 592 (S.D.N.Y 2002).
- l. *United States v Lindh* 212 F.Supp.2d 541, 553 (E.D.V.A. 2002).
- m. Convention With Respect to the Laws and Customs of War on Land (Hague, II) Annex to the Convention, 29 July 1899.
- n. Hague Convention of 1907, Convention With Respect to the Laws and Customs of War on Land (Hague IV).
- o. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
- p. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 12 August 1949.
- q. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949

- r. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
- s. Charter of the International Military Tribunal, the Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany.
- t. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
- u. Statute of the International Tribunal for Rwanda, 33 I.L.M. (1994).
- v. Rome Statute of the International Criminal Court, 37 I.L.M. (1994).
- w. Adam Roberts & Richard, *Documents on the Laws of War* (3d ed. 2002).
- x. Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 Crim. L.F. 291 (2001).
- y. Winthrop, *Military Law and Precedents* (2d Ed. 1920).
- z. Lieber's Code, General Order No. 100 War Department, April 24, 1863.
- aa. Black's Law Dictionary (6th ed. 1990).

5. Discussion

a. Military Commission Instruction No. 2 is a Valid, Binding Instruction

(1) Execution of the war against al Qaida and the Taliban is within the exclusive province of the President of the United States pursuant to his powers as Executive and Commander in Chief under Article II of the United States Constitution.⁵ The Congress, in passing the AUMF of 2001, expressly authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,"⁶ and it is the President's duty to carry out this war.

⁵ *Ex Parte Quirin*, 317 U.S. 1, 26 (1942) "The Constitution confers on the President the 'executive Power', Art II, cl. 1, and imposes on him the duty to 'take Care that the Law be faithfully executed.' Art. II, 3. It makes him the Commander in Chief of the Army and Navy, Art. II, 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, 3, cl. 1.

⁶ Public L. No. 107-40, 115 Stat. 224 (2001)

(2) As a plurality of the Supreme Court just months ago held, “The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”⁷ Furthermore, Congress, in enacting Articles 21 and 36 of the Uniform Code of Military Justice,⁸ expressly recognized the President’s authority to use and to prescribe rules regarding military commissions. Thus, the President’s Military Order is a legitimate, recognized exercise of his Constitutional authority as Commander in Chief.

(3) As commissions are recognized to be the Executive Branch’s prerogative, it has been left to the Executive to determine appropriate guidelines for the conduct of military commissions. “[S]urely since *Ex parte Quirin*, . . . there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations.”⁹

(4) The Executive has issued his guidance with respect to the present military commissions in his Military Order. The Order directs that individuals subject to trial under the Order shall receive a “full and fair trial,”¹⁰ and delegates the authority to promulgate further orders or regulations necessary to implement military commissions to the Secretary of Defense.¹¹ The Secretary of Defense further delegated the authority to issue regulations and instructions to the Department of Defense General Counsel.¹² It is pursuant to this authority that the Department of Defense General Counsel issued, among other instructions, MCI No. 2. This instruction is “declarative of existing law”¹³ and details a number of offenses that “derive from the law of armed conflict.”¹⁴

(5) This declarative instruction, which has a direct lineage to the President’s authority to regulate the conduct of armed conflict, expressly lists “Murder by

⁷ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004), citing *Ex parte Quirin*, 317 U.S., at 28 (emphasis added). See also, *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

⁸ 10 U.S.C. §§ 821, 836 (1994). Congress takes notice of the law of war in this manner: “The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.” [emphasis added]

⁹ *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), cert. denied 352 U.S. 1014 (1957)

¹⁰ PMO, Section 4(c)(2).

¹¹ *Id.*, Section 6(a).

¹² Pursuant to DoD MCO No. 1, Section 7. *Regulations A. Supplementary Regulations and Instructions*: The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President’s Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President’s Military Order. The General Counsel shall issue such instructions consistent with the President’s military order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

¹³ Para. 3(A), MCI No. 2.

¹⁴ *Id.*

an Unprivileged Belligerent” as an offense requiring proof beyond a reasonable doubt of the following elements:

- (a) The Accused killed one or more persons;
- (b) The Accused either:
 - (i) intended to kill or inflict great bodily harm on such person or persons; or
 - (ii) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;
- (c) The accused did not enjoy combatant immunity; and
- (d) The killing took place in the context of and was associated with armed conflict.¹⁵

(6) The instruction also enumerates Attempt among “Other Forms of Liability and Related Offenses,”¹⁶ having the following elements:

- (a) The accused committed an act;
- (b) The accused intended to commit one or more substantive offenses triable by military commission;
- (c) The act amounted to more than mere preparation; and
- (d) The act apparently tended to effect the commission of the intended offense.¹⁷

b. MCI No. 2 Accurately Declares Murder by an Unprivileged Belligerent as a Crime under the Law of Armed Conflict

(1) MCI No. 2 does not create new law; it is declarative of law that previously existed under the Law of Armed Conflict. Murder and other acts of belligerency by an unprivileged belligerent was a crime triable by military commission long before the Accused’s charged activity.

(2) The Law of Armed Conflict does not create offenses that would otherwise not constitute criminal conduct. Rather, it recognizes that certain conduct that is otherwise criminal should not be excused by a state of war. As detailed further below,

¹⁵ MCI No. 2, para. 6(B).

¹⁶ *Id.*, para. 6(C)(7).

¹⁷ *Id.*

the Law of Armed Conflict recognizes that a lawful combatant, acting in consonance with the Law of Armed Conflict, has a legal justification for certain acts that would otherwise subject him to prosecution (e.g., willfully killing or attempting to kill certain categories of other human beings, such as other combatants, or destroying property). Conversely, the Law of Armed Conflict recognizes that a person who is *not* a lawful combatant acting in consonance with the Law of Armed Conflict does *not* enjoy this legal justification and may be prosecuted for his acts of belligerency.

(3) Unlawful Killing

(a) As a starting point, unlawful killing is universally recognized and punished as a crime. “Murder,” according to Black’s Law Dictionary, is “the unlawful killing of a human being by another with malice aforethought.”¹⁸ “Malice aforethought,” in turn, is a “predetermination to commit an act without legal justification or excuse.”¹⁹ The Defense acknowledges that murder is a criminal act, and that an unprivileged belligerent (*i.e.*, one who does not enjoy combatant immunity) can be prosecuted for willfully killing a combatant. The Prosecution concurs with the Defense on this point. However, the Defense contends that this is a domestic offense, triable in a domestic court, not a violation of international law, triable by military commission. This assertion is without merit.

(b) Murder has long been condemned not only under domestic laws, but under international law. As early as 1899,²⁰ at the Hague Convention, the international community recognized that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”²¹ Among other limitations, Section II, Chapter I of Article 23 of the Hague Convention of 1899 prohibited “kill[ing] or wound[ing] treacherously individuals belonging to a hostile nation *or army*.”²² This language was reiterated in the 1907 Hague Convention.

(c) As noted in FM 27-10, the Geneva Conventions of 1949 define willful killing of protected persons as a “grave breach.”²³ Department of the Army Field Manual 27-10, July 1956, para 502. Addressing armed conflicts not of an international character, Geneva IV prohibits “violence to life and person, *in particular murder of all kinds*” of persons taking no active part in hostilities (emphasis added). *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August*

¹⁸ Black’s Law Dictionary, page 1019 (6th ed. 1990).

¹⁹ *Id.* at 957.

²⁰ The Hague Convention of 1899 was later substituted by the Hague Convention of 1907, §2 Art.22, which reiterated the same edict. The convention of 1899 is still cited, however, to show the first point in time that means of injuring the enemy were formally limited in international law.

²¹ *Convention With Respect to the Laws and Customs of War on Land (Hague, II) Annex to the Convention*, 29 July 1899, art. 22, 32 Stat. 1803.

²² *Id.* at art. 23.

²³ See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field of 12 August 1949 (T.I.A.S. 23362)*, Article 50; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (T.I.A.S. 3364)*, Article 51; *Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (T.I.A.S. 3364)*, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (T.I.A.S. 3365)* (“Geneva IV”), Article 147.

(d) The Nuremberg Charter recognized criminal liability for murder by its declaration that the Tribunal “shall have the power to try and punish persons who, . . . whether as individuals or as members of organizations, committed any of the following crimes:²⁴

(a) Crimes against Peace: namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: Namely violations of the laws or customs of war. Such violations shall include, but not be limited to, *murder* [emphasis added], ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against Humanity: namely *murder* [emphasis added], extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all such acts performed by any persons in execution of such plan.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 2, art. 6(a), 82 U.N.T.S. 279, 288, 59 Stat. 1544, 1547.²⁵

(e) Present-day international tribunals – the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for

²⁴ The Nuremberg Tribunal, and the doctrines developed thereunder, have become to be known as the “Nuremberg Principles,” which were unanimously adopted by United Nations Resolution 95(I), which affirmed the principles of international law recognized by the charter of the Nuremberg Tribunal and then judgment of the tribunal. See *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, vol. XXII, *IMT Secretariat*, Nuremberg, 1948, pp. 413-414 and 497 (As reprinted in *Documents on the Laws of War, Third Edition*).

²⁵ See also International Military Tribunal for the Far East, Apr. 26, 1946, 2, art. 5(a)-(b), 4 *Bevans* 20, 28 (using the same or substantially similar language). The Allied Powers also used the same provisions to describe crimes against peace and similarly assigned criminal responsibility for lower level military tribunals in Allied occupied Germany. See Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 3 Official Gazette Control Council for Germany 50, 50-51 (1946). See also Whitney R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* 555 (1954) and Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 *Mil. L. Rev.* 275, 281 (1995).

Rwanda (ICTR) and the International Criminal Court (ICC)²⁶ – all have codified murder in some form as an offense under the customary law of armed conflict.

i. Pursuant to Article 2 of the ICTY Statute, the Tribunal has the power to prosecute persons committing or ordering the commission of grave breaches of the Geneva Conventions of 12 August 1949, including *willful killing* of protected persons.²⁷ Article 5, *Crimes Against Humanity*, states that the Tribunal shall have the power to prosecute any persons responsible for murder when committed in armed conflict, whether international or internal in character, and directed against any civilian population.²⁸

ii. The ICTR Statute contains almost identical provisions.²⁹ Under Article 3, *Crimes Against Humanity*, the Rwandan tribunal has the power to prosecute persons responsible for murder when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.³⁰ Under Article 4, *Violations of Article 3 Common to the Geneva Conventions*, the Rwandan tribunal has the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 including murder.

iii. The Rome Statute of the ICC specifies a number of punishable offenses that include some type of willful killing as an element both as an allegation of crimes against humanity and an allegation of war crimes.³¹ These offenses include: genocide by killing,³² the crime against humanity of murder,³³ and the war crime

²⁶ The U.S. delegation to the ICC appealed to United States federal law during negotiations over the ICC statute. See Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 *Crim. L.F.* 291, 294 n.13, 316, 317 n.86 (2001) (observing that the United States delegation was guided by federal law and U.S. military materials).

²⁷ Statute of the International Tribunal art. 7 32 *I.L.M.* 1192-94, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993), 32 *I.L.M.* 1203 [hereinafter ICTY Statute], available at <http://www.un.org/icty/badic/statut/stat2000.htm>

²⁸ ICTY Statute, Art 5.

²⁹ Statute of the International Tribunal for Rwanda adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg. at 2, U.N. Doc. S/RES/955 (1994), 33 *I.L.M.* (1994) [hereinafter ICTR Statute], available at <http://www.ict.rw/ENGLISH/basicdocs/statute.html>

³⁰ ICTR Statute, Art 3.

³¹ July 17, 1998, art. 28(b)(i), U.N. Doc. A/CONF. 183/9 (1998), 37 *I.L.M.* 999 [hereinafter Rome Statute] available at <http://www.un.org/law/icc/statute/rome.htm>.

³² Rome Statute, Article 6 (a) Genocide by killing

1. The perpetrator killed 2 one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

³³ Article 7 (1) (a) Crime against humanity of murder

of willful killing of protected persons,³⁴ killing or wounding a person *hors de combat*,³⁵ and treacherously killing or wounding individuals belonging to the hostile nation or army.³⁶

(f) Unlawful killing clearly is a charge contemplated by international law. Furthermore, the status or means used by the perpetrator, as well as the status of the victim, can be determinative of whether a killing is unlawful.

(4) Acts of Belligerency by an Unprivileged Belligerent

(a) Individuals “who take up arms and commit hostile acts without having complied with the conditions pre-scribed by the laws of war for recognition as belligerents are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.” Field Manual No. 27-10, Article 80, 18 July 1956 (citation omitted). *See also, id.*, Articles 81, 82. Historically, those caught committing acts of belligerency who do not qualify as such, sometimes termed “unlawful combatants” or “unprivileged belligerents,” have been treated harshly.³⁷

(b) The recognition that unlawful combatancy violates the law of nations dates far back in our Nation’s history. In a 1795 concurring opinion, Justice Iredell noted that “hostility committed without public authority” is “not merely an offence against the nation of the individual committing the injury, **but also against the**

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1. The perpetrator killed 7 one or more persons.
 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

³⁴ Rome Statute, Article 8 (2) (a) (i) War crime of wilful killing

1. The perpetrator killed one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

³⁵ Rome Statute, Article 8 (2) (b) (vi) War crime of killing or wounding a person *hors de combat*

1. The perpetrator killed or injured one or more persons.
2. Such person or persons were *hors de combat*.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

³⁶ Rome Statute, Article 8(2)(b)(xi).

³⁷ In fact, summary execution of unlawful combatant was not uncommon. *See, e.g., United States v. List* (“Hostage Case”), 11 Trials of War Criminal 1223 (GPO 1950)(indictment charged Accused had illegally designated captured individuals as “partisans” and executed them. Accused acquitted on this charge because Government had failed to prove beyond a reasonable doubt that the captured individuals were, in fact, lawful combatants).

law of nations” *Talbot v. Janson*, 3 U.S. 133 (1795)(Iredell, concurring)(emphasis added).

(c) Colonel Winthrop, in his famed *Military Law and Precedents* noted:

Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.

Winthrop, *Military Law and Precedents*, 783 (1895, 2d Ed. 1920). During the Civil War, military commissions were used frequently to try and punish unlawful combatants, typically for “Violation of the laws of war.” *Id.* at 784. Many were sentenced to death. *Id.* at 784, footnote 57.

(d) Lieber’s Code, General Order No. 100 War Department, April 24, 1863, recognized the distinction between lawful and unlawful combatant as well. Under Article 57, “So soon as a man is armed by a sovereign government, and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.” Article 82, on the other hand, states that those who “commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates.” *Id.*

(e) The United States Supreme Court has specifically upheld the jurisdiction of military commissions to try unlawful combatants:

By universal agreement and practice the law of war draws a distinction between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. **Unlawful combatants** are likewise subject to capture and detention, but in addition they are **subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.**

Ex Parte Quirin, 317 U.S. 1 (1942)(emphasis added). A plurality of the Supreme Court recently reaffirmed this holding. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004)(“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incidents of war’”).

(f) Qualification for Lawful Belligerent Status. The standard for who qualifies as a privileged belligerent has changed through the years. Under modern international standards, to qualify as belligerents, an army, militia or volunteer corps must fulfill the following conditions:

(i) Be commanded by a person responsible for his subordinates;

- (ii) Have a fixed distinctive emblem recognized at a distance;
- (iii) Carry arms openly; and
- (iv) Conduct their operations in accordance with the laws and customs of war.

Convention With Respect to the Laws and Customs of War on Land (Hague IV), 18 October 1907, Chapter 1, art.1, 32 Stat. 1803

(g) Furthermore, the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall also be regarded as belligerents, *but only if they carry arms openly and if they respect the laws and customs of war. Id.*

(h) Therefore, if an individual does not qualify as a belligerent, either due to his failure to abide by the first three above-enumerated requirements, or because the operations that he conducts are not in accordance with the laws and customs of war, then the laws and rights of war need not be applied to that individual under existing international law, and he may be tried by military commission for the acts which render his belligerency unlawful. *Quirin*, 317 U.S. at 31.

(i) Thus, under the Law of Armed Conflict, only a lawful combatant enjoys “combatant immunity” or “belligerent privilege” for the lawful conduct of hostilities during armed conflict. *See Padilla v. Bush*, 233 F.Supp. 2d 564, 592 (S.D.N.Y. 2002). Lawful combatants may be held as prisoners of war, but are immune from criminal prosecution by their captors for belligerent acts that do not constitute war crimes. *Id.* at 592, *citing United States v. Lindh*, 212 F.Supp. 2d 541, 553 (E.D.V.A. 2002). The entire body of law stands for a simple proposition: those considered “lawful combatants” under the law cannot be prosecuted for belligerent acts if they abide by the law of armed conflict. Conversely, those who either do not meet the definition of lawful combatant – “unlawful combatants” – or who meet the definition but do not abide by the law of armed conflict may be prosecuted by military commission. MCI No. 2 correctly states this proposition, and even provides the added protection that the Accused enjoys a presumption that he is a lawful combatant, and the Prosecution must prove beyond a reasonable doubt that he did not enjoy combatant immunity during his acts of belligerency in order to convict him of this offense.

(5) The principles and precedent of international law fully support the declaration under MCI No. 2 that Murder by an Unprivileged Belligerent states an offense and is triable by military commission. Accordingly, the Defense’s Motion to Dismiss should be denied.

6. Attached Files. None.

7. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. As the Defense's Motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//

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Lieutenant Colonel, U.S. Marine Corps
Prosecutor